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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)
)
Amendment of the Commissions Rules to)
Preempt State and Local Regulation)
of Tower Siting for Commercial Mobile)
Service Providers)

RM-8577

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COMMENTS

Submitted by:

James H. Mullen, County Executive
County of Prince William, Virginia
1 County Complex Court
Prince William, Virginia. 22192

February 17, 1995

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I. INTRODUCTION

1. Pending before the Federal Communications Commission (Commission) is a PETITION FOR RULEMAKING (Petition) brought forth on December 22, 1994 by the Cellular Telecommunications Industry Association (CTIA). In its petition, the CTIA requests the Commission to issue a Notice of Proposed Rule Making to amend its rules so to preempt state and local governments from enforcing zoning and other regulations upon Commercial Mobile Radio Service (CMRS) providers with respect to location and construction of new towers.

2. The County of Prince William, Virginia, herewith, pursuant to 47 C.F.R. §1.405, expresses its opposition to the notion proposed in the CTIA petition for the Commission to preempt the right of local government to determine land usage within its boundary.

II.

COMMENTS

3. Local government planning and zoning boards, and local elected officials representing the public at the most fundamental level, must reserve their right to manage local land use. The public must be afforded a voice through its local elected officials in determining the destiny of its land development.

4. Tower site selection criteria should not be limited to radio frequency coverage predictions and availability of land. Tower facilities may have major adverse impact to the safety and quality of life in residential areas, land value, and, important historical sites and parks nearby where they are located.

5. It is essential that citizens, businesses and other legitimate interested parties be afforded the opportunity to voice their concerns and opinions with respect to the impact upon them and the public in general which may be incurred as a result of a new tower facility. It is the duty of local government officials to weigh those concerns, if any, with the merits and benefits to be derived from a proposed tower facility. Local elected officials have the obligation to their constituents and the public-at-large to manage land use and development in a fair and equitable manner.

6. We submit that it would be wrong for the Commission to assert its authority to preempt local and state government authority to approve local tower sites, as proposed in the CTIA petition. We believe Congress has exhibited no intent for the Commission to do so.

7. While Section 332 of the Communications Act of 1934, as amended, (Act), does limit state and local government's ability to regulate entry to, or the rates charged by the mobile services, it is an unreasonable conclusion that local government therefore may not disallow the construction of structures inconsistent with its Comprehensive Plan for land use and development, or not in compliance with local building code.

8. CTIA's assertion that the Commission's precedent to preempt state regulation of satellite dishes and amateur antenna towers supports preemption of tower site regulation is presumptuous. It is a long stretch to compare the typical home satellite dish or typical amateur radio station to the typical CMRS station. Amateur stations are residential, noncommercial in purpose, generally have tower heights below 70 feet above ground level and have no separate equipment shelter. Satellite dishes are seldom over 20 feet high. Nowadays, satellite receiver stations are similar in size to broadcast television receiver antennas. Satellite stations, if necessary, may be screened much more easily than towers.

9. The CTIA in its petition cited 47 C.F.R. §25.104 with respect to the Commission's precedent. Here, the CTIA overlooks the fact that the preemption under this Commission rule is for NON-TERRESTRIAL earth to space to space / space to earth communications. This does not relate to the terrestrial point to point / multipoint preemption which CTIA's petition seeks. It is

not appropriate to compare "apples with oranges" when we are speaking about "oranges." In this regard, it is appropriate to cite only the Commission TERRESTRIAL preemption rule of 47 C.F.R. §97.15(e), also known as PRB-1.

10. With respect to §97.15(e), which the CTIA also refers to in its preemption precedent (for the Amateur Radio Service) argument, a closer look is in order. §97.15(e) states in part: "[State and local government regulation] ...must not preclude amateur service communications. Rather, it must reasonably accommodate such communications and must constitute the minimum practicable regulation to accomplish the state or local authority's legitimate purpose." That is not a full preemption. Moreover, what preemption the Commission has given to the amateur radio service should be taken in the context of why the amateur service enjoys this limited preemption¹.

¹ PRB-1 Memorandum Opinion and Order, adopted September 16, 1985. Page 9, (part of) paragraph 24 (emphasis added): ...We recognize the Amateur radio service as a voluntary, noncommercial communication service, particularly with respect to providing emergency communications. Moreover, the amateur radio service provides a reservoir of trained operators, technicians and electronic experts who can be called on in times of national or local emergencies. By its nature, the Amateur Radio Service also provides the opportunity for individual operators to further international goodwill. Upon weighing these interests, we believe limited preemption is warranted. (emphasis added)

11. CTIA further asserts that if telephone poles are permitted by local government, therefore, equivalent radio facilities must be permitted. We have difficulty in accepting this analogy. What is equivalent radio facilities? The typical telephone pole (which is gradually disappearing in favor of buried cable) is typically 25 to 30 feet in height. These do not compare to 150 to 199 feet high monopoles. CMRS radio towers are often much higher than the monopoles and may require painting and lighting pursuant to 47 C.F.R. Part 17, and may have flashing strobe lights.

12. A more appropriate comparison is the broadcast industry. The broadcast industry does not enjoy the tower site placement preemption being sought by CTIA. However, if such preemption is granted by the Commission to the CMRS, then we can expect the broadcasters and several other industries to file their petitions for their exemptions too. And, the Commission will indeed have created what CTIA argues against - a policy to arbitrarily favor one particular communications service over another, obviously with respect to different radio services at least.

13. Congressional efforts to foster the development and implementation of new wireless mobile services must not be misconstrued as a mandate for the CTIA industry to have the right to thwart the process of local plan review and approval, and to erect towers and facilities without regard to local ordinances and the concerns of the local citizens and officials.

14. The effect of the preemption that CTIA seeks would not be in the public interest. For example, the location of radio towers in incompatible locations will likely adversely affect land value. Land value affects tax revenues. The reduction of land value and resulting loss of tax revenue adversely affects local governments' ability to provide public services. Such loss may have to be made up with higher taxes. Also, significant historical lands and environmentally sensitive parks and view sheds may be disrupted. This all may be avoided through sound land use management.

15. We submit that tower site selection and usage is in need of local government regulation. As the "wireless revolution" unfolds, more and more towers will be erected. Perhaps virtual "tower zones" may be needed, or the landscape may be inundated with towers. Tower use should to be consolidated to the extent that it is practical. Local government is in a unique position to facilitate such consolidations.

16. In regard to telecommunications, Prince William County's goal (and we believe that of most local governments) is to ensure the adequate provision of telecommunications infrastructure in its jurisdiction which will not only provide essential communications services to the public, but will also support economic growth while promoting compatible land uses.

17. We recognize that the public demand for telecommunications services is increasing, while appropriate locations for these facilities are becoming increasingly difficult to find in our urbanizing locale. Thus we seek to encourage the sharing of facilities, both public and private, to the extent that it is practical. This encouragement of sharing of facilities is beneficial directly to the public and the industry itself. This is an appropriate role for local government and is not "regulation" of the industry.

III.

CONCLUSION

18. Plan review and approval is a necessary and vital function of local government to maintain a coordinated and equitable land use management program. The public and the CMRS industry itself will, in the broad sense, benefit from such review over the long term.


19. It is recognized by local governments, certainly Prince William County, that the "wireless revolution" is good. People and business want and need wireless communications. Local governments want to attract and cooperate with business and industry. Indeed, we wish to help pave the way for the build out of the CMRS infrastructure. But, this should not be at the expense of our land use planning. The CMRS Industry should work with local government to find mutually suitable tower site locations.

20. The existing limited preemptions which the Commission has established for satellite receiver earth stations and the Amateur Radio Service are effectively (and we believe intended) for residential noncommercial use. Preemption for CMRS from local zoning laws would have the effect of subsidizing this commercial industry at the expense of local government and the public, through the devaluation of land which in turn decreases local tax revenues. Ultimately, the result may be tax increases to offset this loss of revenue, or decreases in public services. Moreover, the preemption would be unfair to other radio industries.

21. Section 332 of the Act, as revised by the Omnibus Budget Reconciliation Act of 1993 does not mandate the Commission to confer upon CMRS providers a right to bypass local government land use ordinances. Local government land use management is not "regulation" of the CMRS industry.

22. We urge the Commission not to issue a Notice of Proposed Rule Making in regard to this matter. It is not in the public's best interest. Such Proposed Rule would undoubtedly be vigorously opposed by the state and local governments across the nation.

Respectfully submitted,


James H. Mullen
County Executive
County of Prince William, Va.

IV.

CERTIFICATE OF SERVICE

I, Samuel Somers, do hereby certify, pursuant to 47 C.F.R. §1.405 (a), that a copy of these COMMENTS were sent by United States First Class Mail to the parties listed below on the day and date first above written.

1. Cellular Telecommunications Industry Association
Michael F. Altschul, Vice-President, General Counsel
Randall S. Coleman, Vice-President, Regulatory Policy/Law
1250 Connecticut Avenue, N.W., Suite 200
Washington, D.C. 20036

Respectfully,



Samuel Somers

Communications Engineer
County of Prince William, VA